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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

FRANK LARGO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. –

FRANK LARGO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit Court entered in the above-entitled cause on May 10, 1965.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported but is reproduced herein as petitioner's Appendix A.

JURISDICTION

The opinion and judgment of the Seventh Circuit Court of Appeals was filed and entered on May 10, 1965. A petition for rehearing was filed on May 20, 1965. The Court of Appeals, *en banc,* denied the petition for rehearing on June 21, 1965, two judges dissenting. A copy of said order is included herein as petitioner's Appendix B. The jurisdiction of this court is invoked under Title 28 USCA 1254.

QUESTIONS PRESENTED

1. Whether the Court of Appeals has rendered a decision in conflict with decisions of other courts of appeals on the same matter.

2. Whether the Court of Appeals has decided a federal question in a manner in conflict with applicable decisions of this court.

3. Whether the opinion of the Court of Appeals constitutes such a departure from federal judicial procedure so as to require this court to exercise its power of supervision.

STATUTES INVOLVED

The following statutory provisions are set forth in petitioner's Appendix C; Title 18 USC 472, 473.

STATEMENT

Petitioner and two other parties were charged in three counts with violations of Title 18 USC 472, 473, prohibiting possession and transfer of counterfeit monies and conspiracy to do the same. A jury found them guilty on March 16, 1964. The jury was selected on March 11, 1964.

Petitioner moved for a mistrial based upon defendant's Exhibits 1 and 2, newspaper articles appearing in the Chicago Sun-Times and Chicago Evening American, the substance of which are set out as Petitioner's Appendix D and Appendix E. The trial judge then questioned the jurors in regard to the newspaper articles. Most of the jurors said that they had not read any article concerning the matter. One juror, however, stated he read the article in the American. In response to questions put by the court the juror stated that there was nothing about the article that might influence him so that he could not be a fair and impartial juror in the case. There were other jurors present while this juror was being interrogated by the trial court. The court overruled the motion for the mistrial.

The article in the Sun-Times stated that petitioner had been arrested the year before as a keeper of a disorderly house. The article in the Chicago American referred to a tape recording which was admitted in evidence, quoted a United States Attorney concerning the tape recording, and reported that the agent in charge of the Chicago Secret Service Office identified the petitioner and the other defendants as "king pins" of a counterfeit ring which turned out excellent forgeries. The agent in charge did not testify at the trial. Petitioner was sentenced to ten years.

REASONS FOR GRANTING THE WRIT

Petitioner was deprived of a fair trial due to the prejudicial newspaper publicity and the failure of the trial judge to take proper precautions to offset the effects of the newspaper publicity.

The newspaper articles in question are not reprinted in either of the appendices filed by the parties below. They are found in the transcript, which has been certified to this court, as Defendant's Exhibits 1 and 2 on page 59, 61; 143, 145.

The substance of the article in the Evening American attributes statements to Secret Service Agent Martineau to the effect that the defendants had passed $12,000.00 in counterfeit during a six-week period while they were under surveillance and that they were "king pins" of a counterfeiting ring which turned out excellent forgeries. Martineau was not called as a witness nor was there any evidence admitted in the course of the trial which tended to corroborate the newspaper story in the foregoing particulars. Juror Archer had read the article in the American. Petitioner contends that the subsequent mode of interrogation employed by the trial court was insufficient as a matter of law to accord a petitioner a fair trial and the motion for mistrial should have been sustained.

It is significant to note that the Seventh Circuit has had occasion to delineate the proper practice and procedure under these circumstances. In *U. S.* v. *Accardo*, 298 F. 2d 133, (1962), the Seventh Circuit Court of Appeals there held that the trial judge,

> "... should have, by the careful examination of each juror, out of the presence of the others, determined

> the effect of the articles on those who had read them and whether they had discussed the articles with others . . . these individual interviews would have tended to overcome reluctance to speak out." (at page 136)

In *Coppedge* v. *U. S.*, 272 F. 2d 504, CCA-DC (1959), the Court of Appeals reversed a conviction where it appeared that some of the jurors had read articles in newspapers during the course of the trial and the jurors were interrogated by the trial court collectively. None of the jurors responded to a question by the trial court as to whether or not any of them could not ignore the articles and bring in a fair verdict solely on the evidence. The Court of Appeals reversed, holding that the admonition by the court was insufficient; that the interrogation made by the court of the jurors was inadequate for the protection of the defendant.

The Court of Appeals for the Fourth Circuit has adopted a rule which would seem to go further than *Coppedge* in *Holmes* v. *U. S.*, 284 F. 2d 716 (1960). The court there held that when it affirmatively appears that individual jurors have read newspaper articles containing information incompetent, if offered at the trial, that the defendant had been previously guilty of criminal conduct, a new trial is mandatory.

In *Briggs* v. *U. S.*, 221 F. 2d 636, CCA-6 (1955), the Court of Appeals reversed a conviction although there was no direct evidence in the case that the newspaper articles in question were read by any member of the jury.

This court has, in *Marshall* v. *U. S.*, 360 U.S. 310, 79 S. Ct. 1171, 3 L. Ed. 2d 1250 (1959), passed upon this question. In *Marshall* the trial judge on learning that news accounts had reached the jurors summoned them into his chambers one by one and each of the seven jurors who

had read the articles stated to the trial judge that he would not be influenced by them and could decide the case only on the evidence of record and that he felt no prejudice against the defendant as a result of the articles. This court there held that the exposure of the jurors to this information was so prejudicial that it necessitated the grant of a new trial. This court in *Marshall* hinged its decision upon the supervisory power of the court to formulate and apply proper standards for enforcement of the criminal law in the federal judiciary.

More recently this court in a memorandum order granted certiorari and ordered a new trial in a case where there was no showing that any of the jurors had even read the articles in question. *Janko* v. *U. S.*, 336 U.S. 716, S. Ct. 1662, 6 L. Ed. 2d 846 (1961). The opinion and facts below are reported in *Janko* v. *U. S.*, 281 F. 2d 156, CCA-8 (1960).

Justice Frankfurter in his concurring opinion in *Irvin* v. *Dowd*, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751, has stated the problem quite succinctly:

> ". . . . This court has not yet decided that the fair administration of criminal justice must be subordinated to another safeguard of our constitutional system—freedom of the press, properly conceived. The court has not yet decided that, while convictions must be reversed and miscarriages of justice result because the minds of the jurors or potential jurors were poisoned, the poisoner is constitutionally protected in plying his trade."

The various Circuit Courts of Appeals have reached apparently different results when considering this question. The difficulty in the application of the "special facts" doctrine enunciated in *Marshall* is that it necessarily involves a subjective determination by each Court of Ap-

peals as to what may or may not constitute sufficient "special facts" to warrant a new trial based upon adverse and prejudicial newspaper publicity reaching the jurors during the progress of the trial.

In federal prosecutions the constitutional question of whether or not the defendant has been accorded a fair trial need not be considered under these circumstances. In the Per Curiam opinion rendered by this court in *Marshall* the suggestion is implicit that in federal prosecutions a more stringent standard is imposed. Convictions will be reversed not because of a violation of a defendant's constitutional right to a fair trial but to preserve the imperative of judicial integrity in the administration of criminal justice in the federal court.

The majority opinion of the Court of Appeals for the Seventh Circuit concedes that the trial court deviated from the correct procedure in interrogating the jurors as to the newspaper articles in question. The opinion then concludes, however, that since proof of petitioner's guilt is "overwhelming" the prejudicial effect is insignificant.

In *Marshall* this court was not concerned with the degree of proof which had been presented in the trial court concerning that defendant's guilt. A subjective determination by a panel of three judges as to a particular defendant's degree of guilt is a tenuous yardstick by which to measure the constitutional rights of defendants.

The injection of this factor into a determination of whether or not a defendant should be accorded a new trial constitutes a sharp and radical departure from previously adhered to doctrines of the administration of criminal justice in the federal courts. This court, in the protection of constitutional rights has never concerned itself with whether or not proof of guilt of a defendant was "overwhelming".

As pointed out by Judge Swygert in his dissenting opinion,

> ". . . such a variable standard, in my opinion, is antithetic to the very concept of due process. The Sixth Amendment's guarantee of a fair trial requires that the same kind of trial be afforded every defendant—to those whose guilt appears doubtless as well as to those whose guilt appears less certain. The standard of fair procedure ought not depend upon whether a seemingly just verdict has resulted." (Appendix A—Dissenting Opinion)

The constitutional right of a defendant to a fair trial is at least equal in stature and dignity to the publisher's right to peddle newspapers. So long as the press of this country conceives freedom of press to mean freedom without responsibility, petitions of this nature will be filed; so long as transgressions of the individual rights of defendants are committed by an irresponsible press it is earnestly hoped that such petitions will be granted by this court.

CONCLUSION

This petitioner faces a sentence of ten years imprisonment. The Court of Appeals has concluded that since the evidence adduced at the trial did not present a close issue of guilt or innocence there was no prejudicial error. This court should grant certiorari not only for the relief of this individual petitioner but for the reason that a clear exposition by this court of certain guide lines the trial courts are to follow will aid the orderly administration of justice in the federal system.

Respectfully submitted,

MAX COHEN
Attorney for Petitioner

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1964—APRIL SESSION, 1965

No. 14789
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
FRANK LARGO and JOSEPH TENUTO,
Defendants-Appellants,
No. 14790
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JOHN REYNOLDS,
Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

May 10, 1965

Before KNOCH, SWYGERT and MAJOR, *Circuit Judges.*

KNOCH, *Circuit Judge.* All three defendants-appellants, Frank Largo, Joseph Tenuto, and John Reynolds, were charged with violations of Title 18, U. S. C. §§472, 473 and 371, possession and transfers of counterfeit money and conspiracies to do the same. The jury found all three to

be guilty. Frank Largo and John Reynolds were sentenced to serve ten years each and Joseph Tenuto to serve eight years.

The jury was selected and admonished by the Court with respect to newspaper accounts of the case. Trial was adjourned to the following day, March 12, 1964.

At the opening of Court on March 12, 1964, the defendants moved for mistrial on the basis of an article from the CHICAGO SUN-TIMES of that date.

The Trial Judge called the jurors into the courtroom one after the other and asked each whether he had seen any articles relating to the trial.

One juror said that she had read only a headline which she could no longer remember. Another said he had read an article in the CHICAGO'S AMERICAN. A third juror said that he had read only the first words of a CHICAGO SUN-TIMES article but had put it aside when he came across the Trial Judge's name. A fourth juror said he saw the headline and skipped it. All of these last three jurors denied that anything they had read would affect their impartiality as jurors. The rest of the jurors denied seeing any articles pertaining to the case.

The Trial Judge admonished all the jurors not to read newspaper articles relating to the trial. He denied the motion for mistrial.

At the afternoon session of the same day, the defendants again moved for mistrial on the basis of an article in the CHICAGO'S AMERICAN of the night before. This motion was also denied. The Court stated:

> Let the record show that the Court has read this article, that the Court did poll the jury, and the Court

is of the opinion that as a result of the examination of the juror who read this article that he was not prejudiced and nothing to impair the impartiality.

The two articles in question read as follows:

Chicago Sun-Times, Thurs., Mar. 12, 1964

TAPED EVIDENCE OK'd IN COUNTERFEITING TRIAL

A 45-minute tape recording of negotiations of three men charged with peddling counterfeit money was admitted as evidence in their trial Wednesday in U.S. District Court.

Judge Edwin A. Robson heard the playback of a four-way conversation of a Secret Service agent and the three defendants Sept. 14 in Room 729 of the Morrison Hotel and upheld its admissibility.

The three men are charged with possessing and selling $29,000 in phony $10 bills.

They are Joseph A. Tanuto, 42, of 2705 N. Hamlin, an ex-convict; Frank C. Largo, 48, of 125 E. Ridge, Gary, who was arrested last year as a keeper of a disorderly house, and John Reynolds, 43, of 3336 W. Beach, a machinist.

Secret Service Agent James Griffith testified that he was in a room next to Room 729 recording the conversation by means of two hidden microphones.

Another agent, Robert Motto, said he posed as a phony money passer and was in the room with the three men negotiating a deal to buy $100,000 worth of the counterfeit money.

He said that the three arrived with $29,000 of the phony bills in an attache case and that he paid $4,500 in real money for it.

Asst. U.S. Atty. Gen. James E. Bailey said the bills were the same as those found to have been circulating by ring of passers in seven states. The source of the counterfeit money has not been found, he said.

Chicago's American, Wednesday, March 11, 1964

U. S. TO USE TAPE IN COUNTERFEIT TRIAL

A tape recording made by a secret service agent is to be used Wednesday in the trial of three men in a counterfeiting conspiracy.

On trial before United States District Judge Edwin A Robson are Joseph A. Tenuto, 42, of 2705 N. Hamlin av.; Frank C. Largo, 48, of 125 E. Ridge rd., Gary; and John Reynolds, 43, of 3336 Beach av.

The three were seized by police and secret service agents last Oct. 13 after one of them sold a government agent 2,900 counterfeit $10 bills for $4,350 at the corner of Monroe and Clark streets.

The arrest occurred just one block from the United States courthouse, where the three are being tried.

Not in Position

James M. Bailey, assistant United States attorney, said the tape recording was made by Robert J. Motto, the secret service agent to whom the bogus money was sold.

"I'm not in a position to say now what is in the recording," said Bailey. "It might be of advantage to the opposition if I did. But it's really quite interesting."

Bailey said he did not anticipate any difficulty in entering the tape into evidence.

The three men had passed about $12,000 during the six weeks they were under surveillance, according to Maurice G. Martineau, acting agent in charge of the Chicago secret service office.

Identified the Three

Martineau identified the three as "kingpins" of the counterfeiting ring, which turned out what he described as "excellent forgeries." The only outstanding flaw was a light green tint to areas that should be white.

Martineau's agents had tried to obtain $100,000 in bogus bills,

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At the close of the day the Trial Court again admonished the jury respecting news, radio or television reports.

Prior to retiring to consider their verdict, the jury were instructed as to the evidence which they might consider and were reminded that they must completely disregard press, radio, or television reports.

There was overwhelming proof of defendants' guilt. Secret Service Agent Robert Motto testified that he purchased a sample of counterfeit money from defendants Reynolds and Tenuto; that he arranged with defendants Tenuto and Largo to buy $100,000 in counterfeit money for $15,000 and $29,000 in counterfeit money for $4,300; and that defendant Reynolds delivered to Agent Motto, at the Morrison Hotel in Chicago, a satchel containing $29,000 in counterfeit money, in the presence of defendant Tenuto. All three defendants were arrested as they left the hotel. Other agents and police officers corroborated Agent Motto's testimony as to the various meetings he had with the defendants.

On recall, Agent Motto's testimony provided the foundation for offer and admission into evidence of a tape recording of a part of his conversations with defendants Tenuto and Largo.

On this appeal, the defendants contend that they:

> * * * were deprived of a fair trial because the jury was contaminated by prejudicial newspaper publicity, the trial judge further failing to take proper and necessary steps to vaccinate the jury against the effects of such contamination.

The defendants rely on *Coppedge* v. *U. S.*, D.C. Cir., 1959, 272 F. 2d 504, 507; *Marshall* v. *U. S*, 360 U.S. 310, 312-13, (1959); and *U. S.* v. *Accardo*, 7 Cir., 1962, 298 F. 2d 133, 136, with particular emphasis on *Accardo*, where this Court said:

> He [the Court] should have, by the careful examination of each juror, out of the presence of the other, determined the effect of the articles on those who had read them and whether they had discussed the articles with others. [citing *Coppedge*] These individual interviews would have tended to overcome reluctance to speak out.

In the case before us the jurors were called into the courtroom one by one, but each was allowed to remain in the courtroom so that only the first juror called was interviewed out of the presence of other jurors.

The jury were well aware that the tape recording contained the voices of defendants Tenuto and Largo but not that of defendant Reynolds as they themselves heard the tape. The Secret Service Agent who made the recording, the Assistant U. S. Attorney who tried the case and counsel for defendant Reynolds, all pointed out to the jury that Reynolds' voice was not on the tape. Incidentally, his presence and statements made by him were clearly established by the evidence of the Agents who heard him speak. The Assistant U. S. Attorney cited as a source of information in the newspaper articles denied in open court that he ever made any such statements.

The U. S. Supreme Court has held that the Constitutional guarantee is satisfied "if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin* v. *Dowd*, 366 U.S. 717, 723 (1961); *Beck* v. *Washington*, 369 U.S. 541, 557 (1962). See also *U. S.* v. *Jannsen*, 7 Cir., 1964, 339 F. 2d 916.

Each case must rest on its own special facts. On learning that a juror has read a news account relating to the case on trial, the Trial Judge must determine whether the nature and strength of any opinion formed by the juror is such as to raise a presumption of partiality. *Reynolds* v. *U. S.*, 98 U.S. 145, 156, 25 E. Ed. 244, 246 (1878).

We believe the better practice is to interview each juror singly out of the presence of all of the other jurors. If the evidence adduced at the trial here had presented a close issue of guilt or innocence, we might well have concluded that prejudicial error existed in this case. However, in the face of the overwhelming proof of the defendants' guilt, we find no justification for a new trial. The judgment of the District Court is affirmed.

Miss Doris A. Coonrod, of the Illinois bar, represented defendant John Reynolds in the District Court as Court-appointed counsel. She continued to represent him without compensation in this Court, filing a brief on his behalf which has been helpful to the Court and for which the Court is grateful.

AFFIRMED.

No. 14780 and No. 14790

SWYGERT, *Circuit Judge*, dissenting.

On the second day of the trial defendants moved for a mistrial predicated upon certain newspaper articles appearing in the *Chicago Sun Times* and the Chicago's *American*. The *Sun Times* article, aside from narrating that the district judge had heard a playback of a tape recording and had upheld its admissibility, named the defendants and stated that Tenuto was an ex-convict and that Largo had been arrested the year before as a "keeper of a disorderly house." The article further related that a Secret Service agent said he posed as a "phony money passer" and was in a room with the defendants negotiating to buy $100,000 in counterfeit money.

The *Chicago's American* article also referred to the tape recording and then went on to relate that the defendants had passed $12,000 in counterfeit money during the six weeks they had been under surveillance by the Secret Service. An assistant United States Attorney was quoted concerning the tape recording. The article also reported that the agent in charge of the Chicago Secret Service office identified the defendants as "kingpins" of a counterfeit ring which turned out "excellent forgeries." The agent in charge did not testify at the trial.

When the matter was brought to the attention of the district court, the judge examined the jurors individually with regard to the articles. He asked substantially the same question of each juror: "It has been called to the court's attention that certain articles appeared in the press in the Chicago newspapers pertaining to this trial. You will recall my admonition of yesterday. I will ask if you saw any of those articles that appeared in the press?"

Juror Archer stated he had read the article in the *Chicago's American*. The judge then asked, "Was there anything about that article that might or could influence you so that you could not be a fair and impartial juror in this case?" The juror answered, "No, sir."

The record indicates that the questioning of juror Archer took place while some of the other jurors were present. This, in itself, was a departure from the required procedure delineated in *United States* v. *Accardo*, 298 F. 2d 133 (7th Cir. 1962). Moreover, the judge did not make a searching inquiry of this juror with regard to whether he might have been prejudiced by the article. *United States* v. *Accardo, supra; Coppedge* v. *United States*, 272 F. 2d 504 (D.C. Cir. 1959). Rather, he merely asked the juror whether the article might or could influence him. In my opinion, this was not a sufficient inquiry under the circumstances. It was not the province of the juror to make the ultimate determination whether the article might or could have prejudiced him. The judge, after further questioning, should have made that final decision himself. If the juror had been removed from the presence of the other jurors and questioned further by the judge, it might well have developed that the juror would have admitted his inability to disregard the statements in the news report.

The fact that only one juror read the article is not determinative. Moreover, the judge did not ask the juror whether he had discussed the article with the other jurors. Speculation, which is legitimate in these circumstances, suggests the possibility that this juror discussed the article was his fellow jurors.

The Government contends that the article under consideration was not inflammatory or prejudicial and cites our recent decision in *United States* v. *Jannsen*, 339 F. 2d

916 (7th Cir. 1964). Although the majority does not discuss the *Jannsen* decision, it should be pointed out that the circumstances there were significantly different from those present here. In the first place, none of the jurors in *Jannsen* said that he had read the allegedly offending newspaper article. Secondly, we held there that the article was not prejudicial. The record in that case shows that the newspaper account related what allegedly had taken place during the trial itself and discussed the evidence presented to the jurors. On the other hand, in the instant case the article included certain information which was not brought before the jury. Moreover, the fact that the statements were exposed to a juror by appearance in a newspaper article rather than by another form of extrajudicial communication is unimportant. If the Government's attorney or the agent had made the same statements as were contained in the newspaper article in the corridor of the courthouse and within the presence and hearing of juror Archer, it could hardly be said that the effect would have been less pernicious.

The majority says: "If the evidence adduced at the trial here had presented a close issue of guilt or innocence, we might well have concluded that prejudicial error existed in this case. However, in the face of the overwhelming proof of the defendants' guilt, we find no jurisdiction for a new trial." If I understand the majority correctly, this court is holding that the standard of a fair trial in a criminal case varies with the degree of guilt which we, as appellate judges, believe the evidence indicates. If the evidence of guilt seems overwhelming, the standard is not as exacting as when the evidence appears less conclusive. Such a variable standard, in my opinion, is antithetic to

the very concept of due process. The sixth amendment's guaranty of fair trial requires that the same kind of trial be afforded every defendant—to those whose guilt appears doubtless as well as to those whose guilt appears less certain. The standard of fair procedure ought not depend upon whether a seemingly just verdict has resulted.

I would reverse and remand for a new trial.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

United States Court of Appeals
For the Seventh Circuit

Chicago, Illinois, 60610

Monday, June 21, 1965

Before

Hon. JOHN S. HASTINGS, Chief Judge
Hon. F. RYAN DUFFY, Circuit Judge
Hon. ELMER J. SCHNACKENBERG, Circuit Judge
Hon. WIN G. KNOCH, Circuit Judge
Hon. LATHAM CASTLE, Circuit Judge
Hon. ROGER J. KILEY, Circuit Judge
Hon. LUTHER M. SWYGERT, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
No. 14789
FRANK C. LARGO and JOSEPH TENUTO,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court sitting en banc that the petition for a rehearing of this cause en banc be, and the same is hereby, DENIED.

(Judges Schnackenberg and Swygert voted to grant the petition).

APPENDIX C

Title 18 U.S.C. 472, 473.

472: Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

473: Whoever buys, sells, exchanges, transfers, receives, or delivers any false, forged, counterfeited, or altered obligation or other security of the United States, with the intent that the same be passed, published, or used as true and genuine, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

APPENDIX D

Article from Chicago Sun-Times dated March 12, 1965, Defendant's Exhibit 1, transcript 59, 61.

The article is headed by a very conspicuous headline. It recites the admission into evidence of a tape recording in the trial of the cause, stating that the trial judge hearing the playback of a conversation between a Secret Service Agent and the defendants in a hotel room on the previous September 14. The article names the petitioner noting that one of the defendants, Tenuto, was an ex-convict and that petitioner was once arrested for keeping a disorderly house. It recites that one secret service agent testified that he posed as a counterfeit-money passer who sought to buy $100,000 in counterfeit money from the defendants. The article quotes the Assistant United States Attorney charged with the prosecution to the effect that the bills sold by the defendants were the same as those circulated by a ring of passers in seven states.

APPENDIX E

Article from Chicago Evening American dated March 11, 1964, Defendant's Exhibit 2, transcript 143, 145.

The article is prefaced by a fairly large headline. It states that a tape recording would be used in the trial of the defendants. That they were seized after the sale of $29,000 in counterfeit on the corner of Monroe and Clark Streets. The article quotes the Assistant United States Attorney charged with the prosecution to the effect that the tape recording was made by the secret service agent to whom the money was sold; that he was not then in a position to say what was in the recording as it might be of advantage to the opposition; that he did not anticipate difficulty in getting it into evidence. The article attributed Secret Service Agent Martineau with the statement that the defendants had passed about $12,000 in counterfeit during six weeks. They were under surveillance and that the three were "king pins" of the counterfeiting ring which turned out "excellent forgeries", save for the light green tint in areas which were properly white.

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787-477—65

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 469

FRANK LARGO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions in the court of appeals (Pet. App. 1–11) are reported at 346 F. 2d 253.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1965, and petitions for rehearing, and for rehearing en banc, were denied on June 21, 1965 (Pet. App. 12). On July 14, 1965, Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to and including August 20, 1965, and the petition was filed on August 19, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court took adequate precautions to insure that no member of petitioner's jury had become prejudiced by newspaper articles published at the outset of petitioner's trial.

STATEMENT

A three-count indictment (C.T. 4–7),[1] filed October 17, 1963, in the United States District Court for the Northern District of Illinois, charged that petitioner and two codefendants, Joseph Tenuto and John Reynolds, possessed with intent to defraud (count 1), sold and transferred with the intent that they be passed as genuine (count 2), and conspired so to sell and transfer (count 3), counterfeited obligations of the United States having a face value of $29,000, in violation of 18 U.S.C. 472, 473, and 371, respectively. Following a trial by jury, all three defendants were found guilty on all counts (C.T. 16–18; Tr. 436–437). Petitioner was sentenced to ten years' imprisonment on each of counts 1 and 2 and five years on count 3, to run concurrently (C.T. 29, 33).[2] The court of appeals affirmed all of the convictions, one judge dissenting (Pet. App. 1–11).

1. The evidence adduced by the government may be summarized as follows:

[1] "C.T." refers to the clerk's transcript, "Tr." to the reporter's transcript. Both transcripts are on file in the office of the Clerk of this Court.

[2] Tenuto received a total of eight years' imprisonment (C.T. 28, 32). Reynolds' sentence was the same as petitioner's (C.T. 30, 34). Each of those defendants appealed his conviction to the court of appeals, but neither has petitioned this Court for a writ of certiorari.

On September 21, 1963, Robert Motto, a special agent of the United States Secret Service, posing as a representative of persons in the "East" who were interested in large-scale purchases of counterfeit currency, bought one hundred counterfeit $10 bank notes from the defendants Tenuto and Reynolds, at a house in East Gary, Indiana, for $200 (Tr. 81–95, 114, 139). Motto told Tenuto and Reynolds that if his principals were satisfied with the quality of the notes he would "go for a bigger buy" at some future date, but that the "the price would have to be lower" (Tr. 88). Three weeks later, on October 11, Motto again met Tenuto and Reynolds, at a lounge in Chicago Heights, Illinois (Tr. 96–97, 105–107). Tenuto introduced Motto to petitioner, who agreed to sell Motto $100,000 worth (face value) of additional counterfeit bills, of the same denomination and style as those of the original purchase, for $15,000 (Tr. 97–104).

On the evening of October 14, 1963, petitioner and Tenuto visited Motto in a hotel room in Chicago which Motto had engaged (Tr. 107–117). They told Motto that they were able to make immediate delivery on only $29,000 of the promised $100,000 in counterfeits, but that the remaining $71,000 would be ready in about 24 hours if Motto could "wait over" (Tr. 111–113). Petitioner proposed to have someone meet Motto at an airport halfway between Chicago and the place in the East to which he assumed Motto would be returning, and to "deliver the $71,000" at that time (Tr. 113). Motto said that this plan was "too dangerous"; that he did not wish to risk a "heist" in a strange city with "a lot of genuine currency" on his

person; that he would, accordingly, for the time being, take only the $29,000 which was immediately available and leave it up to his principals whether to "go for the seventy-one" or buy some "new stuff" (Tr. 113–114). A price of "a little over $4,300" for the $29,000 was agreed upon, and arrangements were made to consummate the sale as soon as the banks opened on the following morning (Tr. 115–117).

At 9:30 on the following morning, October 15, Tenuto again called on Motto in the latter's hotel room, while petitioner remained "[d]ownstairs" (Tr. 117–118). Tenuto asked Motto if he was "ready to deal" and if he "had the money" (Tr. 118). Motto told Tenuto that the money was "in the bank" and that he "wanted to see what [he] was getting" before making payment (*ibid.*). A few minutes later, at petitioner's request, Motto and Tenuto joined petitioner in the coffee shop of the hotel. Motto and Tenuto then returned to the hotel room and petitioner left the hotel to "get the [counterfeit] money" (Tr. 118–119, 121–122). Five minutes later there was a knock on the hotel room door and Reynolds delivered a satchel containing $29,000 in counterfeit $10 bills (Tr. 122–126). Petitioner and his codefendants were arrested shortly thereafter by waiting detectives and secret service agents (Tr. 126–128, 369–370, 373–375).

The foregoing evidence, consisting substantially of testimony by agent Motto, was corroborated by (in addition to other evidence) a tape recording of the conversation between petitioner, Tenuto, and Motto in the hotel room on the evening of October 14 and of the conversation between Tenuto and Motto in the

first of the two hotel-room episodes on the morning of the 15th (Tr. 247–255, 321–322, 357–362). The recordings were made by an associate of Motto's, agent James Griffiths, who was stationed in an adjacent room (Tr. 6–8, 247–250). A mechanical failure in the recording apparatus prevented the recordation of the second episode of the morning of the 15th (involving the delivery by Reynolds of the $29,000 in counterfeits) (Tr. 13, 19–20, 255). Griffiths, however, through an amplifying device attached to the instrument, was able to hear the conversation and sounds associated with the latter incident, and he testified to the substance of what he heard (Tr. 13, 255, 259–262).

No evidence was presented by the defense (Tr. 392, 397).

2. On the morning of March 11, 1964, prior to the empaneling of the jury, a hearing was held on the admissibility of the tape recordings described above (Tr. 1–53). On the afternoon of the same day, after the recordings had been ruled admissible (Tr. 53–55), the jury was selected and sworn and the case continued to the following morning (Tr. 56–57). Prior to excusing the jurors for the day, the court admonished them not to read any newspaper articles they might see relating to the case, but left them otherwise free to read the daily papers (Tr. 62, 64–65, 149). That evening, under the headline "U.S. to Use Tape in Counterfeit Trial," the *Chicago's American* carried an article on one of its inside pages reporting the court's decision of that morning admitting the recordings, together with a number of background facts relating to the case. A like article, under the head-

line "Taped Evidence OKd in Counterfeiting Trial," appeared on an inside page of the *Chicago Sun-Times* on the following morning, the 12th. Both articles are reproduced in full in the opinion of the court of appeals (Pet. App. 3–5).

At the opening of court on the morning of the 12th, counsel for the defendants called the court's attention to the article in the *Sun-Times* and moved for a mistrial (Tr. 59–64). The trial judge called the jurors into the courtroom, one at a time, and, stating to them that it had come to his attention that there had been some newspaper articles relating to the case, asked each whether he had seen any such articles (Tr. 67–76). One juror, Ross Archer, said he had read the article in the *American* (Tr. 69–70). A second juror said that he had read the first few words of the article in the *Sun-Times* but had put it aside when he came across the judge's name (Tr. 71).[3] Two other jurors said they had seen only "the headline" (the name of the paper was not specified) (Tr. 67–68, 73). One of the latter two said she could not "even remember the headline" (Tr. 68), and the other that he had "skipped it" (Tr. 73). All four of these jurors denied that they would be influenced, or that their impartiality as jurors would be affected, by anything they had read (Tr. 68, 70, 71, 73). The

[3] The judge's name appeared at the beginning of the second paragraph of the article. The first paragraph stated simply: "A 45-minute tape recording of negotiations of three men charged with peddling counterfeit money was admitted as evidence in their trial Wednesday in U.S. District Court" (Pet. App. 3).

remaining jurors all denied having seen any articles pertaining to the case (Tr. 69, 72–73, 74–76).

Each juror, following his reply to the judge's inquiry, was, without objection by defense counsel, allowed to remain in the courtroom while the succeeding jurors were interrogated. Thus only the first of the jurors to be called was interviewed out of the presence of the other jurors.

On the basis of his inquiries and the jurors' replies, the judge ruled that there was no ground for a mistrial and denied the motion (Tr. 77). The jurors were again cautioned not to read any newspaper articles relating to the case, and the trial proceeded (*ibid.*).

At the afternoon session of the same day, defense counsel again moved for a mistrial, on the basis of the article in the *American* which juror Archer had acknowledged having read (Tr. 143–146, 149). This motion was also denied (Tr. 149), the judge observing that he had read the article and that he was of the opinion, as a result of his examination of juror Archer, that the latter's impartiality had not been impaired (Tr. 146).

In his instructions, the judge charged the jury that it was its function to determine the facts "solely on the evidence presented here in the courtroom." Each juror, he said, "must completely disregard any press, television or radio reports which you may have read, seen or heard. Such reports are not evidence; there-

fore, you should not be influenced in any manner whatever by such publicity."[4]

ARGUMENT

Petitioner's sole contention is that the appearance of the above-mentioned newspaper articles immediately prior to the commencement of the trial, and the alleged failure of the trial judge to take "proper precautions to offset the effects of" the articles, deprived him of a fair trial (Pet. 4–8). The contention is without merit.

"The trial judge," this Court has held (*Marshall* v. *United States*, 360 U.S. 310, 312),

> has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. *Holt* v. *United States*, 218 U.S. 245, 251. Generalizations beyond that statement are not profitable, because each case must turn on its own special facts. * * *

There was no abuse of discretion in this case. The trial judge, through inquiries addressed to each individual juror, satisfied himself that only one juror had read either of the articles in question in its entirety, and that juror was able to assure the judge that his impartiality as a trier of the facts had not been impaired by anything he had read. One other juror had read one of the articles in part, but the part which he had read (the opening paragraph) reported merely the fact that a pertinent tape recording had been admitted in evidence. Inasmuch as the jury was to

[4] See pp. 10, 15, and 20 of the reporter's supplemental transcript of the proceedings of March 16, 1964, on file in the office of the Clerk of this Court.

hear the recording in due course as part of the government's evidence, the judge could properly regard this portion of the article as innocuous. Two jurors acknowledged having seen "the headline," but since the headline in each case likewise reported merely the fact that a tape recording was to be used at the trial, the judge could similarly regard what those jurors had seen as non-prejudicial. All three of the last-mentioned jurors, moreover, like the juror who had acknowledged reading one of the articles in its entirety, assured the court that they felt that their impartiality had not been affected. None of the remaining jurors had seen either of the articles.

In addition, the judge stressed in his instructions that all of the jurors "completely disregard" any press, television, or radio reports they might have read, seen, or heard and that they base their verdict solely on the evidence adduced in the courtroom.

It is true that the judge's inquiries in this case, while addressed to the jurors individually, were not made to each in private, *i.e.*, out of the presence of all the other jurors. In *United States* v. *Accardo*, 298 F. 2d 133, 136 (C.A. 7.), the court below suggested that the trial judge, in a like situation, should question each juror privately, in order to overcome any "reluctance to speak out" which might be present. The same court, in *United States* v. *Jannsen*, 339 F. 2d 916, 919–920 (C.A. 7), however, pointed out that the *Accardo* case laid down no "rigid rule" in this respect.[5] In any event, petitioner is in no position to

[5] The relevant language in the *Accardo* decision was, moreover, contained in the opinion of but a single member of the court.

complain of the procedure which was in fact followed here, since he failed to object to it or to suggest any other course than the granting of a mistrial.

If counsel for petitioner believed, when the court's inquiries elicited the fact that juror Archer had read one of the pertinent articles, that the juror's ability to serve as an impartial trier of the facts had been irredeemably compromised, it would have been a simple matter for him to have requested the court to substitute the alternate juror (the record indicates that one such juror had been selected and that this juror, Theodore Green, was one of the jurors who had reported to the court that they had seen nothing in the newspapers relating to the case (Tr. 57, 76; C.T. 18)). No such request was made. Counsel contented himself, as we have said, with the making of a simple motion for a mistrial. In these circumstances, and particularly where, as here, the record "fairly shrieks the guilt of the parties" (*Lutwak* v. *United States*, 344 U.S. 604, 619–620), there is no basis for a claim of prejudicial error.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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